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DEPARTMENT OF AGRICULTURE

Forest Service

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS-R7-SM-2012-N044]

[FXFR13350700640L6-123-FF07J00000]

Subsistence Management Program for Public Lands in Alaska

AGENCIES: Forest Service, Agriculture; Fish and Wildlife Service, Interior.

ACTION: Notice.

SUMMARY: The Departments, in compliance with the determinations of the District Court in *Peratrovich v. United States*, No. 3:92-cv-00734-HRH (D. Alaska), announce the initiation of reviews of pre-statehood withdrawals and reservations in the Tongass National Forest. These reviews, as ordered by the United States District Court for the District of Alaska, will be used in

regulatory proceedings for the purpose of implementing Title VIII of the Alaska National Interest Lands Conservation Act with respect to submerged public lands within the Tongass National Forest.

FOR FURTHER INFORMATION CONTACT: Chair, Federal Subsistence Board, c/o U.S. Fish and Wildlife Service, Attention: Peter J. Probasco, Office of Subsistence Management; (907) 786–3888 or *subsistence@fws.gov*. For questions specific to National Forest System lands, contact Steve Kessler, Regional Subsistence Program Leader, USDA, Forest Service, Alaska Region; (907) 743–9461 or *skessler@fs.fed.us*.

SUPPLEMENTARY INFORMATION:

Background

Under Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA) (16 U.S.C. 3111–3126), the Secretary of the Interior and the Secretary of Agriculture (Secretaries) jointly implement the Federal Subsistence Management Program. This Program provides a priority for taking of fish and wildlife resources for subsistence uses on Federal public lands and waters in Alaska. The Secretaries published temporary regulations to implement this Program in the **Federal Register** on June 29, 1990 (55 FR 27114), and final regulations in the **Federal Register** on May 29, 1992 (57 FR 22940). The Secretaries have amended these regulations a number of times. Because this Program is a joint effort between Interior and Agriculture, these regulations are located in two titles of the Code of Federal Regulations (CFR): Title 36, “Parks,

Forests, and Public Property,” and Title 50, “Wildlife and Fisheries,” at 36 CFR 242.1–28 and 50 CFR 100.1–28, respectively. The regulations contain the following subparts: Subpart A, General Provisions; Subpart B, Program Structure; Subpart C, Board Determinations; and Subpart D, Subsistence Taking of Fish and Wildlife.

Litigation

In *Peratrovich v. United States*, No. 3:92-cv-00734-HRH (D. Alaska), the plaintiffs challenged, in part, the failure to include as public lands, subject to the priority under Title VIII of ANILCA (16 U.S.C. 3113–3126), certain marine waters in the Tongass National Forest. In its May 31, 2011, order, the Court partially held in favor of the plaintiffs. The Court stated that “it is the duty of the Secretaries [Agriculture & Interior] to identify any submerged lands (and the marine waters overlying them) within the Tongass National Forest to which the United States holds title.” Because, if such title exists, it “creates an interest in [the overlying] waters sufficient to make those marine waters public lands for purposes of [the subsistence provisions] of ANILCA.”

In the regulations, the Secretaries excluded the marine waters within the Tongass National Forest as public lands subject to the subsistence priority since marine waters within the exterior boundaries of a National Forest are not subject to reserved water rights. Subsequently, the United States also disclaimed interest in the marine submerged lands within the exterior boundaries of the Tongass National Forest in *Alaska v. United States*, No. 128 Orig., 546 U.S. 413 (2006).

In that case, the State of Alaska sought to quiet title to lands underlying marine waters within the boundaries of the Tongass National Forest and elsewhere within southeastern Alaska. In the course of that litigation, the United States disclaimed ownership to submerged lands in the Tongass National Forest, with some exceptions that generally involve small tracts, *Alaska v. United States*, 546 U.S. at 415. The Supreme Court accepted the disclaimer.

When the United States assumed control over the subsistence program in Alaska in 1990, the Secretaries responded to comments on the scope of the program during promulgation of the interim regulations, published in the **Federal Register** on June 29, 1990 (55 FR 27114). The Secretaries stated that “the United States generally does not hold title to navigable waters and thus navigable waters generally are not included within the definition of public lands.” That position was changed in 1999 when the subsistence priority was extended to waters subject to a Federal reserved water right in the Katie John litigation. *Alaska v. Babbitt*, 72 F. 3d 698 (9th Cir. 1995). Later the Secretaries identified certain submerged marine lands that did not pass to the State where the subsistence priority applied. The regulations recognized that additional marine waters might subsequently be determined to be public lands. Over the years, small areas of submerged marine lands in the Tongass National Forest have been identified as public lands subject to the subsistence priority (71 FR 49997, August 24, 2006, as amended by 74 FR 34696, July 17, 2009).

The court acknowledged in its order that inventorying all these lands could be an expensive undertaking, but that it is a burden “necessitated by the ‘complicated regulatory scheme’ which has resulted from the inability of the State of Alaska to implement Title VIII of ANILCA.”

In its October 17, 2011, order, the court “enjoined” the United States “to promptly initiate regulatory proceedings for the purpose of implementing the subsistence provisions in Title VIII of ANILCA with respect to submerged public lands within Tongass National Forest” and directed entry of judgment.

Purpose of Notice

To comply with the order, the Federal Subsistence Board is proceeding to identify for the Secretaries those submerged lands within the Tongass National Forest that did not pass to the State at statehood and that are subject to Title VIII of ANILCA.

The Bureau of Land Management (BLM) has commenced the review of pre-statehood (January 3, 1959) withdrawals of submerged lands in the marine waters of the Tongass National Forest following the Court’s May 31, 2011, order that preceded the final October 17, 2011, order. The BLM review process is proceeding. In addition to BLM, the U.S. Forest Service has started its review of records to identify lands filled in, built up, or otherwise reclaimed by the United States for its own use prior to Alaska statehood, and other areas that may not have passed to the State at statehood.

This notice announces to the public, including rural Alaska residents and federally recognized Tribes of Alaska, the initiation of reviews of pre-statehood withdrawals in the Tongass National Forest. When final, these reviews will be used in regulatory proceedings, either by the Secretaries, or the Board, for the purpose of implementing Title VIII of ANILCA with respect to submerged public lands within the Tongass National Forest, as ordered by the U.S. District Court for Alaska.

____/s/ Peter J. Probasco May 11, 2012____

Peter J. Probasco Date

Assistant Regional Director

U.S. Fish and Wildlife Service

Acting Chair, Federal Subsistence Board

____/s/ Steve Kessler May 11, 2012____

Steve Kessler Date

Subsistence Program Leader

USDA–Forest Service

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